

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT HAYES, } Case No. CV 12-7400 JC  
Plaintiff, }  
v. }  
MICHAEL J. ASTRUE, } MEMORANDUM OPINION  
Commissioner of Social }  
Security, }  
Defendant. }

## I. SUMMARY

On September 4, 2012, plaintiff Robert Hayes (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; September 5, 2012 Case Management Order ¶ 5.

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1       Based on the record as a whole and the applicable law, the decision of the  
 2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge  
 3 (“ALJ”) are supported by substantial evidence and are free from material error.<sup>1</sup>

4       **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE  
 5           DECISION**

6       On October 21, 2005, plaintiff filed an application for Supplemental  
 7 Security Income benefits which asserted that plaintiff became disabled on March  
 8 9, 2005. (Administrative Record (“AR”) 25, 67, 51). The ALJ examined the  
 9 medical record and heard testimony from plaintiff (who was represented by  
 10 counsel) on June 14, 2007. (AR 878-92). On July 18, 2007, the ALJ determined  
 11 that plaintiff was not disabled through the date of the decision. (AR 67-71).

12       On June 25, 2009, the Appeals Council granted review, vacated the ALJ’s  
 13 July 18, 2007 decision, and remanded the matter for further administrative  
 14 proceedings. (AR 25, 95-98). On June 16, 2010, the ALJ again examined the  
 15 medical record and also heard testimony from plaintiff (who was represented by  
 16 counsel), a medical expert and a vocational expert. (AR 893-906).

17       On July 9, 2010, the ALJ again determined that plaintiff was not disabled  
 18 through the date of the decision. (AR 25-35). Specifically, the ALJ found:  
 19 (1) plaintiff suffered from the following severe impairments: back pain, diabetes,  
 20 hypertension, anxiety, obesity, depression and bipolar disorder (AR 27);  
 21 (2) plaintiff’s impairments, considered singly or in combination, did not meet or  
 22 medically equal a listed impairment (AR 28); (3) plaintiff retained the residual  
 23 functional capacity to perform a full range of light work (20 C.F.R. §416.967(b))  
 24 (AR 29); (4) plaintiff could not perform his past relevant work (AR 34); (5) there

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26       <sup>1</sup>The harmless error rule applies to the review of administrative decisions regarding  
 27 disability. See Molina v. Astrue, 674 F.3d 1104, 1115-22 (9th Cir. 2012) (discussing contours of  
 28 application of harmless error standard in social security cases) (citing, *inter alia*, Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006)).

1 are jobs that exist in significant numbers in the national economy that plaintiff  
 2 could perform (AR 35); and (6) plaintiff's allegations regarding his limitations  
 3 were not credible to the extent they were inconsistent with the ALJ's residual  
 4 functional capacity assessment (AR 30).

5 The Appeals Council denied plaintiff's application for review. (AR 6, 11).

### 6 **III. APPLICABLE LEGAL STANDARDS**

#### 7 **A. Sequential Evaluation Process**

8 To qualify for disability benefits, a claimant must show that the claimant is  
 9 unable "to engage in any substantial gainful activity by reason of any medically  
 10 determinable physical or mental impairment which can be expected to result in  
 11 death or which has lasted or can be expected to last for a continuous period of not  
 12 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)  
 13 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The  
 14 impairment must render the claimant incapable of performing the work claimant  
 15 previously performed and incapable of performing any other substantial gainful  
 16 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,  
 17 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

18 In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
 19 sequential evaluation process:

- 20 (1) Is the claimant presently engaged in substantial gainful activity? If  
     so, the claimant is not disabled. If not, proceed to step two.
- 21 (2) Is the claimant's alleged impairment sufficiently severe to limit  
     the claimant's ability to work? If not, the claimant is not  
     disabled. If so, proceed to step three.
- 22 (3) Does the claimant's impairment, or combination of  
     impairments, meet or equal an impairment listed in 20 C.F.R.  
     Part 404, Subpart P, Appendix 1? If so, the claimant is  
     disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform claimant's past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow the claimant to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at 1110 (same).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of proving disability).

## **B. Standard of Review**

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must “consider the record as a whole, weighing both evidence that supports and

1 evidence that detracts from the [Commissioner's] conclusion.”” Aukland v.  
 2 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
 3 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
 4 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
 5 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

#### 6 **IV. DISCUSSION**

7 Plaintiff contends that a reversal or remand is warranted because the ALJ  
 8 failed properly to evaluate the opinions of Dr. Roger M. Samawi, plaintiff’s  
 9 treating physician. (Plaintiff’s Motion at 4-9). As discussed in detail below,  
 10 plaintiff is not entitled to a reversal or remand on this basis.

##### 11 **A. Pertinent Law**

12 In Social Security cases, courts employ a hierarchy of deference to medical  
 13 opinions depending on the nature of the services provided. Courts distinguish  
 14 among the opinions of three types of physicians: those who treat the claimant  
 15 (“treating physicians”) and two categories of “nontreating physicians,” namely  
 16 those who examine but do not treat the claimant (“examining physicians”) and  
 17 those who neither examine nor treat the claimant (“nonexamining physicians”).  
 18 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (footnote reference omitted). A  
 19 treating physician’s opinion is entitled to more weight than an examining  
 20 physician’s opinion, and an examining physician’s opinion is entitled to more  
 21 weight than a nonexamining physician’s opinion.<sup>2</sup> See id. In general, the opinion  
 22 of a treating physician is entitled to greater weight than that of a non-treating  
 23 physician because the treating physician “is employed to cure and has a greater  
 24 opportunity to know and observe the patient as an individual.” Morgan v.

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 26 <sup>2</sup>Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to  
 27 draw bright line distinguishing treating physicians from non-treating physicians; relationship is  
 28 better viewed as series of points on a continuum reflecting the duration of the treatment  
 relationship and frequency and nature of the contact) (citation omitted).

1 Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir.  
 2 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

3 The treating physician's opinion is not, however, necessarily conclusive as  
 4 to either a physical condition or the ultimate issue of disability. Magallanes v.  
 5 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d  
 6 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician's opinion is not  
 7 contradicted by another doctor, it may be rejected only for clear and convincing  
 8 reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal  
 9 quotations omitted). The ALJ can reject the opinion of a treating physician in  
 10 favor of another conflicting medical opinion, if the ALJ makes findings setting  
 11 forth specific, legitimate reasons for doing so that are based on substantial  
 12 evidence in the record. Id. (citation and internal quotations omitted); Thomas v.  
 13 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out  
 14 detailed and thorough summary of facts and conflicting clinical evidence, stating  
 15 his interpretation thereof, and making findings) (citations and quotations omitted);  
 16 Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite "magic words" to  
 17 reject a treating physician opinion – court may draw specific and legitimate  
 18 inferences from ALJ's opinion). "The ALJ must do more than offer his  
 19 conclusions." Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). "He must  
 20 set forth his own interpretations and explain why they, rather than the  
 21 [physician's], are correct." Id. "Broad and vague" reasons for rejecting the  
 22 treating physician's opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599,  
 23 602 (9th Cir. 1989).

24 **B. Analysis**

25 Plaintiff contends that the ALJ improperly rejected the opinions expressed  
 26 by Dr. Samawi in two physical residual functional capacity questionnaires dated,  
 27 respectively, June 29, 2007 and April 13, 2010 – specifically, that due to his  
 28 impairments, plaintiff was essentially unable to perform even sedentary work on a

1 full time basis (collectively “Dr. Samawi’s Opinions”). (Plaintiff’s Motion at 6-9)  
2 (citing AR 820-27). The Court concludes that a remand or reversal is not  
3 warranted on this basis because the ALJ properly rejected Dr. Samawi’s Opinions  
4 for clear and convincing, specific and legitimate reasons supported by substantial  
5 evidence.

6 First, with respect to Dr. Samawi’s opinions in the June 29, 2007  
7 questionnaire that plaintiff had significant functional limitations in part due to  
8 daily low back pain with radiculopathy (AR 322, 818), as the ALJ accurately  
9 noted, such opinions conflict with and are unsupported by Dr. Samawi’s own  
10 treatment notes from the preceding few months which reflect that plaintiff had  
11 “denie[d] pain,” that plaintiff was “doing well,” and that physical examinations of  
12 plaintiff had essentially been normal. (AR 31) (citing Exhibit 17F at 2-6 [AR 307-  
13 11]). As the ALJ noted, the record does not contain evidence which suggests that  
14 plaintiff’s condition worsened between Dr. Samawi’s treatment of plaintiff in  
15 December 2006 to May 2007 and the June 2007 questionnaire. (AR 31). To the  
16 extent the ALJ rejected Dr. Samawi’s Opinions due to such conflict, the ALJ  
17 properly did so for clear and convincing reasons based on substantial evidence.  
18 See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (A discrepancy  
19 between a physician’s notes and recorded observations and opinions and the  
20 physician’s assessment of limitations is a clear and convincing reason for rejecting  
21 the opinion.).

22 Second, the ALJ also properly rejected Dr. Samawi’s Opinions because they  
23 were otherwise not supported by the physician’s own notes or the record as a  
24 whole. See Bayliss, 427 F.3d at 1217 (“The ALJ need not accept the opinion of  
25 any physician, including a treating physician, if that opinion is brief, conclusory,  
26 and inadequately supported by clinical findings.”) (citation and internal quotation  
27 marks omitted); Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003) (treating  
28 physician’s opinion properly rejected where treating physician’s treatment notes

1 “provide no basis for the functional restrictions he opined should be imposed on  
2 [the claimant”]). For example, as the ALJ noted, contrary to Dr. Samawi’s opinion  
3 that plaintiff suffered from disabling symptoms including low back pain, an MRI  
4 of plaintiff’s back revealed only mild facet arthropathy and normal disc without  
5 nerve root impingement or stenosis at L3-L4, moderate facet arthropathy and  
6 normal disc without pathologic disc bulging, herniation or stenosis at L4-L5, and  
7 only mild facet arthropathy with normal disc without pathologic bulging,  
8 herniation, or stenosis. (AR 31) (citing Exhibit 17 F at 9 [AR 314]). Moreover, as  
9 the ALJ noted, Dr. Samawi’s treatment records also reflect normal examinations of  
10 plaintiff and that plaintiff’s treatment was “essentially routine and/or conservative  
11 in nature.” (AR 31) (citing Exhibit 17F at 2-6 [AR 307-11]). In addition,  
12 although Dr. Samawi opined that plaintiff had marked limitations in the ability to  
13 deal with work stress, Dr. Samawi’s treatment notes reflect that plaintiff’s  
14 symptoms appeared well controlled by medication, and that plaintiff had not  
15 received any mental health treatment other than medication (*i.e.*, therapy). (AR  
16 34) (citing Exhibit 26F at 3 [AR 439]). As the ALJ noted, the record reflects that  
17 plaintiff cancelled or failed to show up for several scheduled psychiatric  
18 appointments. (AR 34) (citing Exhibit 22F at 3, 6 [AR 407, 410]). Plaintiff’s  
19 failure to seek or be prescribed more aggressive treatment supported the ALJ’s  
20 rejection of Dr. Samawi’s Opinions. See Rollins v. Massanari, 261 F.3d 853, 856  
21 (9th Cir. 2001) (ALJ properly rejected a treating physician’s opinion who  
22 prescribed conservative treatment and where the plaintiff’s activities and lack of  
23 complaints were inconsistent with the physician’s disability assessment). To the  
24 extent plaintiff disagrees with the ALJ’s interpretation of the medical evidence,  
25 the Court will not second-guess the ALJ’s reasonable conclusions.

26 Third, although plaintiff asserts that treatment notes from the St. Mary  
27 Medical Center reflect plaintiff’s “continued complaints of back pain” (Plaintiffs  
28 Motion at 6) (citing AR 446-547), the ALJ properly rejected Dr. Samawi’s

1 Opinions to the extent they were based on such subjective complaints which the  
 2 ALJ also discredited.<sup>3</sup> (AR 30-31); see, e.g., Bayliss, 427 F.3d at 1217 (ALJ  
 3 properly rejected opinion of treating physician which was based solely on  
 4 subjective complaints of claimant and information submitted by claimant's family  
 5 and friends).

6 Fourth, the ALJ properly rejected Dr. Samawi's Opinions in favor of the  
 7 conflicting opinions of the state-agency examining physician, Dr. John Sedgh  
 8 (who determined that plaintiff could lift, carry, sit, stand and walk without  
 9 limitation) (AR 256), and the medical expert, Dr. Barbara Felkins (who reviewed  
 10 the record medical evidence and testified that plaintiff would be able to do "light  
 11 work") (AR 897). The opinion of Dr. Sedgh was supported by his independent  
 12 examination of plaintiff (AR 253-55), and thus, even without more, constituted  
 13 substantial evidence upon which the ALJ could properly rely to reject the treating  
 14 physician's opinions. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th  
 15 Cir. 2001) (consultative examiner's opinion on its own constituted substantial  
 16 evidence, because it rested on independent examination of claimant); Andrews v.  
 17 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995). Dr. Felkins' testimony also  
 18 constituted substantial evidence supporting the ALJ's decision since it was  
 19 supported by the other medical evidence in the record as well as Dr. Sedgh's  
 20 opinion and underlying independent examination. See Morgan, 169 F.3d at 600  
 21 (testifying medical expert opinions may serve as substantial evidence when "they  
 22 are supported by other evidence in the record and are consistent with it").

23 Finally, contrary to plaintiff's suggestion, the ALJ did not fail in his duty to  
 24 develop the record by not recontacting Dr. Samawi to obtain additional evidence  
 25 to support the treating physician's opinions. (Plaintiff's Motion at 6-7). Although  
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27 <sup>3</sup>Plaintiff does not challenge the ALJ's determination that plaintiff's allegations regarding  
 28 his limitations were not credible to the extent they were inconsistent with the ALJ's residual  
 functional capacity assessment.

1 plaintiff bears the burden of proving disability, the ALJ has an affirmative duty to  
2 assist a claimant in developing the record “when there is ambiguous evidence or  
3 when the record is inadequate to allow for proper evaluation of the evidence.”  
4 Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted);  
5 Bustamante, 262 F.3d at 954; see also Webb v. Barnhart, 433 F.3d 683, 687 (9th  
6 Cir. 2005) (ALJ has special duty fully and fairly to develop record and to assure  
7 that claimant’s interests are considered). Here, Dr. Samawi’s physical residual  
8 functional capacity questionnaires essentially contained check-box opinions with  
9 little explanation of the bases for the opinions. The ALJ had no obligation to  
10 recontact Dr. Samawi before rejecting such conclusory opinions. See De Guzman  
11 v. Astrue, 343 Fed. Appx. 201, 209 (9th Cir. 2009)<sup>4</sup> (ALJ has no obligation to  
12 recontact physician to determine the basis for opinions expressed in “check-off  
13 reports that d[o] not contain any explanation of the bases of their conclusions.”)  
14 (citation and internal quotation marks omitted). Even so, the ALJ did not find that  
15 the record as a whole was ambiguous or inadequate to permit a determination of  
16 plaintiff’s disability. To the contrary, the ALJ properly relied on the opinions of  
17 Drs. Sedgh and Felkins which, as noted above, constituted substantial evidence  
18 that plaintiff was not disabled. Therefore, even assuming Dr. Samawi’s Opinions  
19 were themselves inadequate to allow the ALJ to determine the basis therefor, the  
20 ALJ did not err in failing to seek clarification. See Bayliss, 427 F.3d at 1217 (no  
21 duty to recontact where other evidence in record is adequate for ALJ to reach a  
22 disability determination).

Accordingly, a remand or reversal on this basis is not warranted.

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<sup>4</sup>Courts may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social  
3 Security is affirmed.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5 DATED: January 29, 2013

6 /s/  
7 Honorable Jacqueline Chooljian  
8 UNITED STATES MAGISTRATE JUDGE  
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